SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-566

JOHN LAWRENCE REED,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Second District, State of California.

CHARLES G. RUBIN,
Attorney at Law,
316 West Second Street, Suite 400,
Los Angeles, Calif. 90012,
(213) 485-1001,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petition for a Writ of Certiorari to the Court of Appeal, Second District, State of California.

Petitioner John Lawrence Reed respectfully prays that a Writ of Certiorari issue to review the action of the Court of Appeal, Second District, of the State of California, affirming the trial court's judgment of conviction. (Petition for hearing denied by the Supreme Court of the State of California on October 2, 1974.)

Opinion Below.

The Court of Appeal issued a written opinion affirming the trial court's judgment against the petitioner. (See Exhibit A.) The Supreme Court of the State of California summarily denied petitioner's petition for a hearing, without issuing a written opinion. (See Exhibit B.)

Jurisdiction.

The California Supreme Court denied the petition for hearing on October 2, 1974. This Court's jurisdiction is invoked under Title 28 United States Code, § 1257(3).

Questions Presented.

Petitioner was denied due process of law and equal protection of the law in that there was not substantial evidence to support the trial court's findings; further, petitioner was subjected to an unlawful search which cannot be justified as one incident to a lawful arrest, necessitated by exigent circumstances nor consented to. Finally, petitioner was arrested without probable cause.

Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution provides in substance protection for persons against unreasonable searches and seizures. The Fourteenth Amendment to the United States Constitution makes these rights of criminal defendants applicable to state court trials.

Statement of the Case.

Appellant is, and at all times herein mentioned, was a resident of the County of Los Angeles, State of California.

On March 19, 1973, an Information was filed by the District Attorney for the County of Los Angeles, charging Appellant with a violation of Health and Safety Code, Section 11911, possession of a dangerous drug, to wit, an amphetamine, for sale. On May 16, 1973, an Amendment to Information was filed, charging the Appellant with one prior felony conviction. Appellant

was arraigned and denied the allegation. At the trial in this matter, the Court granted Appellant's motion under Penal Code, Section 1118 to enter a judgment of acquittal as to the alleged prior felony conviction. [R.T. 77, lines 25-28; p. 78, lines 1-8.]

On March 20, 1973, Appellant was arraigned in Department NW R of the Superior Court, County of Los Angeles, and pled not guilty. Trial and motion pursuant to Penal Code, Section 1538.5 were set for April 26, 1973.

On April 4, 1973, Appellant's ex parte motion for reports and transcripts was denied.

Thereafter, trial and motion under Penal Code, Section 1538.5 were continued on motion of Appellant and finally came before the Court on August 7, 1973. On that date, Appellant's motion pursuant to Penal Code, Section 1538.5 was denied. On motion of Appellant, trial was trailed to August 8, 1973.

Thereafter, trial was continued or trailed several times. The cause came before the Court for a non-jury trial on August 15, 1973, at which time Appellant was found guilty as charged. Appellant's motion for mistrial was denied and probation and sentence hearing was set for September 24, 1973.

On September 24, 1973, on motion of the Court, probation and sentence hearing and Appellant's motion for new trial were continued to October 1, 1973.

On October 1, 1973, the Court, in lieu of granting a new trial, found the Appellant guilty of a violation of Health and Safety Code, Section 11910, possession of an amphetamine, and not guilty of a violation of Health and Safety Code, Section 11911, no finding having been made as to the alleged prior conviction. The Ap-

pellant was sentenced to the State Prison for the term prescribed by law and the Court requested diagnostic information and recommendation as a basis for review under the terms of Penal Code, Section 1168. Appellant was to be given credit for 237 days heretofore served.

On October 3, 1973, Appellant's ex parte motion to set bail on appeal was granted and bail was set at $30,000.00. Appellant also filed a Notice of Appeal through his counsel, Ron Minkin.

On March 12, 1974, petitioner filed his opening brief to the Court of Appeal, State of California, Second Appellate District. In an opinion filed on July 23, 1974, the Court of Appeal affirmed the judgment of conviction. (See Exhibit A.)

On September 6, 1974, petitioner filed a Petition for Hearing in the Supreme Court of the State of California. On October 2, 1974, the petitioner's petition for hearing was summarily denied. (See Exhibit B.)

Statement of Facts.

During the course of the hearing on Appellant's motion pursuant to Penal Code, Section 1538.5, the substantive evidence received by the Court was as follows:

Officer Larry M. Davenport of the Los Angeles Police Department testified that on December 26, 1972, he received information concerning the sale of methamphetamine from a person named John Hardeman. [R.T. 6.] On that date, Officer Davenport was at Hardeman's residence at 1548 North Topanga Canyon in Los Angeles when Hardeman said that he would assist Officer Davenport in arresting his, Hardeman's narcotics supplier. [R.T. 6.]

According to Officer Davenport, Hardeman said that his supplier was Appellant, John Reed. [R.T. 6.] Hardeman then made a phone call, allegedly to John Reed in which he indicated to the person on the other end of the line that he, Hardeman, wanted to purchase an ounce of speed or methamphetamine. [R.T. 7.] Officer Davenport listened in on this conversation. [R.T. 7.]

This telephone conversation occurred at approximately 6:30 p.m., and Hardeman's alleged connection indicated that he would come to the residence at 1548 North Topanga Canyon at approximately 8:00 p.m. [R.T. 8.] Thereafter, Appellant was observed by the officers to drive up in a brown car and park near the residence which was a house trailer. Before exiting the car, Appellant was seen to lean over toward the glove compartment area of the car. [R.T. 9 and 10.] Officer Davenport and his partner then hid themselves in another part of the trailer as the Appellant approached. [R.T. 10.]

When Appellant entered the trailer, Officer Davenport testified that he heard him say, "I'm confused. How much stuff did you want?" [R.T. 11, lines 12-14.] At this point, Appellant was arrested for possession of dangerous drugs. A search of the Appellant uncovered no contraband at all. [R.T. 13, lines 24-26.]

Soon thereafter, Officer Davenport said to Appellant, "I'm going to search it (the car he had driven to the location)." [R.T. 16, line 5.] The subsequent search of the car uncovered the items of contraband which formed the basis of the charge in this case. [R.T. 16, line 20.]

On cross-examination, the following testimony was elicited: Officer Davenport had originally gone to Hardeman's residence on December 26, 1972, to serve a search warrant. [R.T. 19.] This was at approximately 1:00 p.m. [R.T. 22.] The officer testified that he and his partner remained with Hardeman the entire day. [R.T. 22.]

After being arrested, Appellant stated that the car he was driving was not his and that the officers could search it if they wanted to do so. [R.T. 27.] Appellant gave Officer Davenport a key that fit the doors and ignition of the car. [R.T. 28.] When Officer Davenport found that this key did not open the glove compartment or trunk, he requested additional keys. [R.T. 29.] When no additional keys were produced, Officer Davenport returned to the car and forcibly opened both the trunk and glove compartment. [R.T. 29.] Contraband was found in the glove compartment. It was both ascertained that the car was in fact a leased vehicle to someone named Momburger. [R.T. 31.]

At the trial, three witnesses testified on behalf of the Appellant. Paul Arthur Jordan testified that on the day of the arrest, December 26, 1972, he was at the residence of a person named Momburger. [R.T. 79.] On that date, Mr. Jordan had had a telephone conversation with John Hardeman during which Hardeman said that he would pick up a Ford LTD automobile which was parked at the Momburger residence. [R.T. 81.] Mr. Jordan testified that he went horseback riding

and that when he returned at about 4:30 p.m., the car had been removed. [R.T. 82.] Mr. Jordan's conversation with Hardeman had taken place at about 3:30 p.m. [R.T. 82.]

Mr. Jordan further testified that he was involved in a business venture with the Appellant and Mr. Momburger. [R.T. 82-83.] It was also known to Mr. Jordan that John Hardeman was indebted to the Appellant in the amount of $200.00. [R.T. 83-84.]

At the time that John Hardeman called the Appellant and allegedly set up the narcotics transaction, Mr. Jordan was at the Momburger residence along with the Appellant. He testified that Mr. Momburger answered the phone and then handed it to the Appellant. During the conversation, the Appellant became very upset and said that Hardeman wanted to buy some speed. [R.T. 84.] Mr. Jordan testified that the Appellant told him that Hardeman had the money to pay him and that he wanted the Appellant to go and pick it up. [R.T. 85.] He stated that Appellant did leave the residence in an Oldsmobile Cutlass. [R.T. 85.]

David Eugene Bolsinger testified that in the weeks prior to the trial he had made an unsuccessful search for John Hardeman. [R.T. 87-88.]

Appellant, John Lawrence Reed, testified that he was involved in a business pursuit with Mr. Jordan and Mr. Momburger. [R.T. 91.] He further testified that he had received a telephone call from John Hardeman at the Momburger residence on the date in question.

[R.T. 94.] During that conversation, Mr. Hardeman indicated that he wanted to buy some speed. [R.T. 96.] According to Appellant, the conversation then changed to the subject of the money owed to the Appellant by Hardeman with the result being that Appellant agreed to go to Hardeman's residence. [R.T. 96.] Appellant testified that he did go to Hardeman's residence in the Oldsmobile Cutlass leased to Mr. Momburger. [R.T. 97.] He further testified that when he arrived, he made no move toward the glove box of the car. [R.T. 98.]

After Officer Davenport found the contraband and returned to the trailer, according to the testimony of the Appellant, John Hardeman told the officers that the speed belonged to him. [R.T. 105.]

REASONS FOR GRANTING THE WRIT.

It is requested that the Court grant the Writ because the judgment of conviction was based on evidence seized in violation of the Fourth Amendment made applicable to the states by the Fourteenth Amendment.

ARGUMENT.

1. There Was Not Substantial Evidence to Support the Trial Court's Findings.

People v. Medina, 26 Cal.App.3d 809, 815 held:

> "In reviewing a determination of a trial court on a 1538.5 motion, the function of the reviewing court is to determine whether there was substantial evidence to support the trial court's findings."

In accord see also:

People v. Superior Court (Mahle), 3 Cal.App. 3d 476;

People v. Levy, 16 Cal.App.3d 327;

People v. Waters, 30 Cal.App.3d 354.

Appellant contends that there was no probable cause for a search of areas which were inaccessible to Appellant.

In arguing against Appellant's motion pursuant to Penal Code Section 1538.5, the prosecution cited *Chambers, v. Maroney, supra* and *Bethune v. Superior Court, supra.* In *Chambers, supra,* the defendant was arrested in an automobile which was later taken to a police station and searched. The Court held that given probable cause to search, there was no difference between seizing and holding the car and then getting a warrant and an immediate search without a warrant. This holding in *Chambers* was based on *Carroll v. United States*, 267 U.S. 132 which allowed warrantless searches of autos where there was reasonable or probable cause to believe that the automobile contained

contraband coupled with the fact that the automobile was moveable.

The crucial question is whether there was probable cause to search. In the instant case, Appellant was arrested inside of a house trailer. According to testimony given at the special hearing on the 1538.5 motion, Appellant was there to conduct a narcotics transaction. However, other testimony indicated he was there to collect a debt. Regardless of which version is believed, the fact remains that the Appellant was arrested for possession of a dangerous drug. A subsequent search of his person disclosed no contraband. The officers then searched the car the Appellant had been driving. According to the officer, he had observed Appellant making a move toward the glove compartment of the car before he exited. It is entirely possible that the Appellant was merely locking the passenger side door. Indeed, officers had to use a key to first unlock the auto door before searching it. [R.T. 65.]

The Appellant had told the officer that the car was not his, a fact later shown to be correct. It was a car leased to one of Appellant's friends. After an initial search of the car during which the officer discovered no contraband, but found the trunk and glove box to be locked, he returned and requested the key. When none was produced, the officer returned to the car, broke open those two compartments and found contraband in the glove box.

The facts recited above do not constitute probable cause to search. The mere fact that the officer believed the car contained seizable evidence is insufficient. This belief must be reasonable. When the Ap-

pellant was arrested, there was no reason why the officers could not have presented an affidavit to a magistrate and obtained a search warrant.

The People rely on the *Bethune* case, *supra,* in which the defendant was arrested in a car which was searched after the arrest. The search uncovered contraband in the defendant's purse which had been left in the car. The Court in *Bethune* stated that *Chimel* was not applicable because it was not a search incident to an arrest and then justified the search using the *Chambers* case. But, it is important to keep in mind that there must be probable cause to believe the auto contains contraband or seizable items. In *Bethune* an extensive police investigation had revealed much information that the persons arrested with the defendant were involved in narcotics transactions. The arresting officers had even obtained a search warrant for the residence of those persons. Here, there is nothing similar to that situation.

The People also rely upon *People v. Teale,* (1969) 70 Cal.2d 497, a pre-*Chambers* case, *supra,* in which an auto was seized and examined ten days later in a location very distant from the place of arrest. The Court held at 70 Cal.2d 511:

> "When officers, incidental to a lawful arrest, seize an auto or other object in the reasonable belief that such object *is itself evidence*[10] of the commission of the crime to which such arrest is made, any subsequent examination of said object undertaken for determining its evidentiary value does not constitute a 'search' within the meaning of the Fourth Amendment." (Emphasis in original.)

However, footnote 10 at 70 Cal.2d 511 reads as follows:

> "The italicized language is crucial. We think it clear that the Constitution does not permit the seizure incident to arrest merely because it is reasonably believed to be a container for evidence of the charged crime. Only an object reasonably believed to be *itself evidence* of the charged crime is subject to seizure and, therefore, to detailed examination subsequent to seizure." (Emphasis in original).

In the case at bar, Appellant was arrested for possession of dangerous drugs. The officers, in effect, seized the auto when they searched it. However, the auto itself was not the instrumentality of any crime. The Appellant was not charged with transportation of dangerous drugs, only possession. The car was nothing more than a container and the locked glove compartment was a container within a container, if you will.

The Superior Court, in denying Appellant's motion pursuant to Penal Code, Section 1538.5 relied on *Munoz v. Superior Court,* (1971) 21 Cal.App.3d 805 and *Medina v. Superior Court,* (1972) 26 Cal.App.3d 809. *Munoz* is clearly distinguishable from the case at bar. In that case, a member of a car theft ring was arrested and a car parked a short distance away was searched and evidence seized. The Court said *Coolidge* was distinguishable because there, as in the case at bar, all suspects were in custody. The Court in *Munoz* felt that other members of the gang would possibly have come and taken the car, thus satisfying the exigent circumstances of *Coolidge.*

However, the Court did state in footnote 2 at 21 Cal.App.3d 810:

> "We need not, and do not, here consider the effect of *Coolidge* on searches involving other factual situations, such as searches incident to lawful impounds or incident to arrest which involve an application of *Chimel v. California* (1969) 395 U.S. 752 [23 L.Ed.2d 685, 89 S.Ct. 2034]."

It has already been clearly shown that *Chimel* cannot be used to justify the search in this case. Further, the Superior Court's reliance in *Munoz* is misplaced since the facts there were very different. The case at bar is very similar to *Coolidge* which is still the law.

In *Medina*, the defendant was charged with robbery. Two men who had robbed a man of money and certain other things were later arrested in a restaurant. They denied having an auto, but the police found one matching a description they had driven parked in a service station across from the restaurant. They looked in and saw what appeared to be part of the stolen goods in plain view. They then searched the car and, indeed, found what had been taken. Moreover, one of the defendants was wearing the victim's watch at the time of arrest.

The Court in *Medina* cited *Chambers v. Maroney, supra*, and held that probable cause to search the car did exist. However, note that the officers actually saw part of the stolen goods in the car. There is nothing similar to that in the case at bar. The officers here saw nothing in the car, nor did they have any reason to believe that contraband would be found there. The *Medina* Court talked about mobility of the car in the opinion, but their reliance on that is not well founded

since all the suspects were already in custody as in the *Coolidge* case.

Appellant contends that the foregoing clearly shows that the search of his car cannot be justified under any theory advanced by the prosecution or the Superior Court. In light of that, his motion pursuant to Section 1538.5, Penal Code, should have been granted and evidence seized should have been suppressed.

2. The Warrantless Search of Appellant's Automobile Was Unreasonable Under the Fourth and Fourteenth Amendments.

In dealing with warrantless searches, the point of departure is the landmark case of *Coolidge v. New Hampshire*, (1971) 304 U.S. 443, in which the United States Supreme Court held at 403 U.S. 454, 455:

> "Thus, the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions' (citation). The exceptions are 'jealously and carefully drawn' (citation) and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course inoperative.' (citation) '[T]he burden is on those seeking the exemption to show the need for it.' (citation)" (Emphasis in original).

Two of the most often cited exceptions to this rule are warrantless searches incident to a lawful arrest and a warrantless search necessitated by emergency circumstances. Appellant contends that the search in this case fails to fall within either of those two exceptions.

3. The Search Cannot Be Construed as One Incident to a Lawful Arrest.

Assuming only for the sake of argument, that the arrest in this case was valid, the scope of a search incident to the arrest has been well defined by the United States Supreme Court. In *Chimel v. California,* (1969) 395 U.S. 752, the Court held at 395 U.S. 763:

> "There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

In the case at bar, it is undisputed that the Appellant was arrested in a trailer and that the car that was searched without a warrant was located some 50 to 100 feet away. This is very similar to the *Coolidge* case, *supra,* where the defendant was arrested in his house and a car in the driveway was searched. The Court in *Coolidge* held that the search would not be construed as one incident to an arrest under *Chimel* or even under the law as it was prior to the *Chimel* decision.

In *Yale v. Louisiana,* (1970) 399 U.S. 30, the Court held:

> "A search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.' (citations.)"

In *Yale,* the defendant was arrested outside of his house and then taken into the house which was subsequently searched. *Yale* can be seen as the law as it stood prior to *Chimel* because the Court specifically did not apply *Chimel* since they declined to rule on

the case's retroactivity. Thus, in *Coolidge, supra,* the Court relied on both *Chimel* and *Yale* in holding that the search was not one incident to an arrest.

Based on *Coolidge, Chimel* and *Yale,* it is clear that the search in the case at bar cannot be justified as one incident to an arrest.

4. The Search Cannot Be Construed as One Necessitated by Emergency Circumstances.

Much of the prosecution's case and the Superior Court's decision in this matter indicates that the search of Appellant's auto can be justified as one necessitated by emergency or exigent circumstances. Appellant contends that this is not the case.

In *Coolidge v. New Hampshire, supra,* the Court stated at 403 U.S. 461, 462:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."

The Court went on to hold that where a search is not incident to an arrest, a search warrant is required absent some exigent circumstances making it impractical to obtain it. The Court made it very clear that the mere potential mobility of an automobile, standing alone, does not constitute such an exigent circumstance.

In arguing against Appellant's motion pursuant to Penal Code, Section 1538.5, the prosecution cited *Chambers v. Maroney,* (1970) 399 U.S. 42 and *Bethune v. Superior Court,* (1970) 11 Cal.App.3d 249. In *Chambers, supra,* the defendant was arrested in an automobile which was later taken to the police station and searched. The Court held that given probable cause to search, there is no difference between seizing

and holding the car and then getting a warrant and an immediate search without a warrant. The holding in *Chambers* was based on *Carroll v. United States,* (1925) 267 U.S. 132 which allowed warrantless searches of autos where there was reasonable or probable cause to believe the automobile contained contraband combined with the fact that the car was moveable.

The crucial question is whether there was probable cause to search. In the instant case, Appellant was arrested inside of a house trailer. According to testimony given at the special hearing on the 1538.5 motion, Appellant was there to conduct a narcotics transaction. However, other testimony indicated he was there to collect a debt. Regardless of which version is believed, the fact remains that the Appellant was arrested for possession of a dangerous drug. A subsequent search of his person disclosed no contraband. The officers then searched the car the Appellant had been driving. According to the officer, he had observed Appellant making a move toward the glove compartment of the car before he exited. It is entirely possible that the Appellant was merely locking the passenger side door.

The Appellant had told the officer that the car was not his, a fact later shown to be correct. It was a car leased to one of Appellant's friends. After an initial search of the car during which the officer discovered no contraband, but found the trunk and glove box to be locked, he returned and requested the key. When none was produced, the officer returned to the car, broke open those two compartments and found contraband in the glove box.

The facts recited above do not constitute probable cause to search. The mere fact that the officer believed the car contained seizable evidence is insufficient. The *Coolidge* case, *supra,* makes it clear that exigent circumstances must be present which makes obtaining a search warrant impractical. Here, as in *Coolidge,* the accused was already in custody. No one else had accompanied Appellant to the trailer. It is important to remember that *Coolidge* is a later statement of the law from *Chambers v. Maroney, supra.* When the Appellant was arrested, there was no reason why the officers could not have presented an affidavit to a magistrate and obtained a search warrant.

The People rely on the *Bethune* case, *supra,* in which the defendant was arrested in a car which was searched after the arrest. The search uncovered contraband in defendant's purse which had been left in the car. The Court in *Bethune* stated that *Chimel* was not applicable because it was not a search incident to an arrest and then justified the search using the *Chambers* case. But, it is important to keep in mind that there must be probable cause to believe the auto contains contraband or seizable items. In *Bethune,* an extensive police investigation had revealed much information that the persons arrested with the defendant were involved in narcotics transactions. The arresting officers had even obtained a search warrant for the residence of those persons. Here, there is nothing similar to that situation.

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> "When officers, incidental to a lawful arrest, seize an auto or other object in the reasonable belief that such object *is itself evidence*[10] of the commission of the crime to which such arrest is made, any subsequent examination of said object undertaken for determining its evidentiary value does not constitute a 'search' within the meaning of the Fourth Amendment." (Emphasis in original.)

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In the case at bar, Appellant was arrested for possession of dangerous drugs. The officers, in effect, seized the auto when they searched it. However, the auto itself was not the instrumentality of any crime. The Appellant was not charged with transportation of dangerous drugs, only possession. The car was nothing more than a container.

The Superior Court, in denying Appellant's motion pursuant to Penal Code, Section 1538.5 relied on *Munoz v. Superior Court*, (1971) 21 Cal.App.3d 805 and *Medina v. Superior Court*, (1972) 26 Cal.App.3d 809. *Munoz* is clearly distinguishable from the case at bar. In that case, a member of a car theft ring was ar-

rested and a car parked a short distance away was searched and evidence seized. The Court said *Coolidge* was distinguishable because there, as in the case at bar, all suspects were in custody. The Court in *Munoz* felt that other members of the gang would possibly have come and taken the car, thus satisfying the exigent circumstances of *Coolidge*.

However, the Court did state in footnote 2 at 21 Cal.App.3d 810:

> "We need not, and do not, here consider the effect of *Coolidge* on searches involving other factual situations, such as searches incident to lawful impounds or incident to arrest which involve an application of *Chimel v. California* (1969) 395 U.S. 752 [23 L.Ed.2d 685, 89 S.Ct. 2034]."

It has already been clearly shown that *Chimel* cannot be used to justify the search in this case. Further, the Superior Court's reliance in *Munoz* is misplaced since the facts there were very different. The case at bar is very similar to *Coolidge* which is still the law.

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Appellant contends that the foregoing clearly shows that the search of his car cannot be justified under any theory advanced by the prosecution or the Superior Court. In light of that, his motion pursuant to Section 1538.5, Penal Code, should have been granted and all evidence seized should have been suppressed.

5. Appellant Was Arrested Without Probable Cause.

The probable cause formula is generally stated as follows:

> "Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty. See *People v. Ingle*, (1960) 53 Cal.2d 407."

In the case at bar, no such probable cause existed. There was conflicting testimony presented at the special hearing on the motion pursuant to Penal Code, Section 1538.5 as to why the Appellant had gone to the location where the arrest occurred. According to the officers, he had gone there to consummate a narcotics transaction. Appellant and one other witness testified that he had gone there to collect a debt. The officer testified that he had seen Appellant move toward the

glove box of the car before he exited. Appellant denied this.

When Appellant entered the trailer, he said something to the effect, "I'm confused. What was it that you wanted?" At this point, the officers appeared and arrested the Appellant. Prior to Appellant's arrival at the location, John Hardeman had called him trying to set up a narcotics transaction. Appellant never told Hardeman that he had any speed, nor that he intended to sell him any. He merely indicated to Hardeman that he would go to his residence later in the evening. Appellant went there to collect a debt, nothing more.

The facts above do not constitute probable cause to arrest. The officers never saw any narcotics in Appellant's possession, nor did they see any money exchanged. Appellant didn't say, "Show me the money, I've got the stuff in the car." The prosecution produced no evidence that would lead a reasonable man to believe that a crime had been committed.

Once it is established that the arrest was without probable cause, all evidence seized subsequent to that point in time must be suppressed.

People v. Cahan, (1955) 44 Cal.2d 434;
Mapp v. Ohio, (1961) 367 U.S. 643.

Conclusion.

In view of the foregoing reasons, it is respectfully submitted that this petition be granted.

CHARLES G. RUBIN,
Attorney at Law,
Attorney for Petitioner.

EXHIBIT A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, vs. John Lawrence Reed, Defendant and Appellant. 2d Crim. No. 24522, (Superior Ct. No. A 124802).

Filed: July 23, 1974.

APPEAL from a judgment of the Superior Court of Los Angeles County in a prosecution for possession for sale of a dangerous drug. Robert H. London, Judge. Judgment of conviction of possession of a dangerous drug affirmed.

Ron Minkin for Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General—Criminal Division, S. Clark Moore, Assistant Attorney General, and Juliet H. Swoboda and Shunji Asari, Deputy Attorneys General, for Respondent.

Defendant was charged with possession for purposes of sale of a dangerous drug in the nature of an amphetamine. He made a motion under Penal Code section 1538.5 to suppress "all evidence that was received at the time of the preliminary hearing" which consisted of four envelopes containing amphetamine sulfate and a certain credit card and driver's license. The envelopes were seized from an automobile while the other objects were taken from defendant's person at the time of his arrest. At the 1538.5 hearing the evidence and argument were directed almost exclusively to the envelopes of drug.

Taking the evidence most favorable to the People, as we must in support of the judgment (*People v. Mosher* (1969) 1 Cal.3d 379, 395), the following facts were established.

On December 26, 1972, Officers Davenport and Stevens went to a trailer home at 1548 North Topanga Canyon to serve a search warrant on one John Hardeman. In a conversation with Hardeman, the latter offered to "do his connection" who was John Reed. To "do his connection" means to assist the officers in making a case against him. In pursuance of this offer, Hardeman made a phone call which was listened in on by Officer Davenport. Hardeman asked for John Reed. A voice, which Officer Davenport subsequently recognized as that of defendant, responded, "This is John." Hardeman then stated that he had $620 and that he wanted "a righteous weight ounce of speed." The term "righteous weight" is used in the drug trade to mean a full measure of weight. Reed then stated that he would see Hardeman at about 8:00 p.m. at his trailer. About 9:00 p.m. the officers observed a brown car drive up to the trailer and park, facing northbound, on the east side of Topanga Canyon fifty to one hundred feet south of the officers' location. Officer Davenport had previously assisted in narcotic investigations of John Reed and recognized the driver and sole occupant of the car as that person. After stopping, Reed leaned over in the direction of the glove compartment. He then left the car and went to the trailer home. As he reached the door, the officers, who had concealed themselves inside, heard him say to Hardeman, "I'm confused. How much stuff did you want?" Knowing from previous experience that "stuff" is a common word used between people who traffic in narcotics and

dangerous drugs as the product which they are selling or using or dealing, the officers placed defendant under arrest for possession of dangerous drugs. Defendant was searched and was asked his name. In reply he gave a name which Officer Davenport knew was not the name of the person he had just arrested. Finding no contraband on Reed, Officer Davenport told him he was going to search the car which he saw him drive up in. The officer asked for the keys. Defendant responded, "It is not my car. You can search it;" and handed over a bunch of keys. Using one of those keys, the officer opened the car and searched it. Finding the glove compartment locked, Officer Davenport asked for the key. Defendant again responded, "It is not my car." Thereupon the officer forced the glove compartment and found four packets containing a white powdery substance that it was stipulated at the trial would be identified by Mr. J. Settles, an expert forensic chemist, as Desoxyephedrene-Methamphetamine.

Insofar as the search and seizure was concerned, the evidence at the trial was basically the same as that presented at the 1538.5 hearing.

Appellant seeks a reversal on three bases: (1) there was no probable cause for his arrest, (2) the search of the automobile and seizure of the drug was illegal, and (3) the whereabouts of John Hardeman, the informer and a material witness, were never provided to appellant.

Appellant correctly states the probable cause formula as follows: "Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty."

In arguing that the evidence does not meet this test, counsel for appellant improperly states it in the light most favorable to appellant. (E.g., he quotes Reed's statement at the door to be "I'm confused. What was it you wanted?" The trial court was justified in believing the true statement was: "I'm confused. How much stuff did you want?" We are bound by the latter version. Again he states: "Appellant went there to collect a debt, nothing more." The trial court was justified in drawing the inference that appellant's purpose was to deliver an order of "speed.")

Restating the evidence and the inferences to be drawn therefrom in the light most favorable to the People, the trial court was justified in finding that John Hardeman, an informant of unknown reliability, offered to set up his supplier for the police, naming his supplier to be John Reed; pursuant to this offer the informer placed a phone call; Officer Davenport listened in on that call; he heard Hardeman ask for John Reed and offer $620 for a "righteous weight ounce of speed"; the offer was replied to by a voice which the officer subsequently recognized as that of John Reed, with a statement to the effect that he, Reed, would meet Hardeman at his trailer about 8:00 p.m. Within an hour of the appointed time defendant, whom Officer Davenport recognized from previous narcotic investigations, arrived and stated, "How much stuff did you want?"

Certainly this evidence is adequate to cause a man of reasonable care and prudence to believe that defendant was present to deliver an order for dangerous drugs and hence was guilty of the original charge of possession for purposes of sale of a dangerous drug.

Appellant cannot complain because the trial judge leniently reduced the charge to simple possession.

The test of legality of the search and seizure is similar: Did the officer have reasonable cause to believe the automobile contained contraband?

In *Burke v. Superior Court*, 39 Cal.App.3d 28, at page 32, the rule is stated as follows: "Because of the mobility of automobiles, and the ease with which they may vanish while search warrants are being sought, such vehicles are accorded a lesser degree of protection from warrantless searches than are stationary premises. *They may be searched without a warrant when the police have probable cause to believe they contain contraband.*" (Emphasis in original.) (See also *Bethune v. Superior Court*, 11 Cal.App.3d 249, 257.)

The rules allows search upon reasonable ground to believe the car contains contraband even when the search cannot be justified as an incident to a lawful arrest. (*Chambers v. Maroney*, 399 U.S. 42 [26 L.Ed. 2d 419, 90 S.Ct. 1975].)

The rule of *Coolidge v. New Hampshire*, 403 U.S. 443 [29 L.Ed.2d 564, 91 S.Ct. 2022], relied upon by appellant as requiring emergency or exigent circumstances in addition to reasonable cause, does not apply where the articles to be seized are contraband. (*People v. Medina*, 26 Cal.App.3d 809, 816.) No contraband was involved in *Coolidge v. New Hampshire, supra.*

As pointed out above, we have in the case at bench evidence justifying the trial judge in inferring that defendant came to Hardeman's trailer to make delivery of a dangerous drug. Upon search of this person no drug was found. But defendant gave false identification,

warranting an inference of guilty knowledge, and the officer had seen him move in the direction of the glove compartment on parking his car. Thus, there was adequate evidence to support a finding that there was reasonable cause to believe that contraband was being carried exactly where it was found in the glove compartment of the car.

Appellant complains of the denial of his motion for new trial. His first complaint in this regard is as to the sufficiency of the evidence. The dangerous drug was found in an automobile driven by defendant and of which he was recently the sole occupant. Defendant had come to the location after receiving an offer to buy "speed" from him. Other facts are above stated in connection with the validity of his arrest. The fact that no key to the glove compartment of the car was found in defendant's possession or that the car was leased by another, although made available to defendant, merely caused a conflict decided against defendant by the trier of fact.

Finally, defendant complains that the whereabouts of John Hardeman, the informer and a material witness, were never provided to him. There is no evidence that he ever requested that the prosecution furnish him the address of said witness or assist in locating him. Admittedly, the person attempting to serve a subpoena on this witness did not contact the Los Angeles Police Department or the arresting officers, or check with the Los Angeles County Jail. Mere statements of counsel as to what he thought someone else had done are insufficient to establish any concealment or failure of the People to cooperate or assist in locating the witness. No motion for production of or assistance in the production of the witness was ever made. The first time

the question of his whereabouts was raised was at the trial when Officer Davenport was asked on cross-examination if he knew of his whereabouts and responded that he thought Hardeman was in the Los Angeles County Jail. This had been true a few weeks before. Counsel asked for a fifteen-minute recess to ascertain whether Hardeman was in jail. After the court had given him a half hour, he stated: "It appears that we are not going to be able to obtain the presence of this witness and therefore rest at this time." No motion for further continuance nor for assistance in locating the witness was made at that time. *Eleazer v. Superior Court,* 1 Cal.3d 847, 852, requires that the police and district attorney undertake reasonable efforts in good faith to locate the witness so that either party, or the court itself if it so desired, could subpoena him. The prosecution is not required to produce the witness, only to assist on request in his production. *Eleazer* does not impose a general duty on prosecution officials to serve as defense investigators. (*People v. Beagle,* 6 Cal.3d 441, 450-451.)

The defendant having made no proper effort to obtain information concerning, or assistance in locating, Hardeman before or at the time of trial, the court was not required to grant his motion for new trial and allow him to start all over again.

The judgment is affirmed.

Whyte, *J.**

We concur:
Ford, *P. J.*
Allport, *J.*

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*Retired superior court judge sitting under appointment by the Chairman of the Judicial Council.

EXHIBIT B.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California, 94102.

Oct. 2, 1974.

I have this day filed Order Hearing denied.

In re: 2 Crim. *No.* 24522 *People vs. Reed.*

Respectfully,

G. E. BISHEL

Clerk